No. 97-1183

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

DOVE VALLEY BUSINESS PARK ASSOCIATES, LTD., a Colorado Ltd. Partnership; HAVANA STREET, LTD., a Colorado limited partnership and GULLWING ACRES LIMITED LIABILITY CO., a Wyoming limited liability company; and COLORADO NATIONAL BANK, a federally chartered bank, as successor by merger to BANK WESTERN, a federal savings bank,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO; and ADRIAN B. "BERNIE" CIAZZA, TREASURER, ARAPAHOE COUNTY, COLORADO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case commenced as an administrative appeal by the property owners (taxpayers) of Arapahoe County's valuation for purposes of ad valorem taxation of real property. The case now comes before this Court on the narrow issue of whether county treasurers in the State of Colorado, as required by Colorado law, shall retain, for ultimate payment to holders of certificates of purchase of tax liens, "redemption interest"[1] collected on a portion of the taxpayers' real property taxes. The redemption interest at issue is that interest charged for the portion of the underlying valuation which was eventually determined to be incorrect.

Taxpayers petitioned, for and the Colorado Supreme Court granted, certiorari review of the decision of the Colorado Court of Appeals.[2]

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[1] "Redemption interest," is required under Colorado law pursuant to § 39-12-103, 11 C.R.S. (1997).

[2] "The issues were framed on certiorari as follows:

> Did the Court of Appeals err in determining that the County's assessment against the taxpayer of redemption interest on erroneously assessed taxes is a constitutionally permissible taking of petitioners' property?
>
> Did the Court of Appeals err in determining that petitioners' equitable claim of unjust enrichment must fail because the county assertedly did not receive a benefit from the taxpayer, did not encourage or initiate the transaction which it benefited from, and is not typically the principal beneficiary of redemption interest?" *See Dove Valley Bus. Park Assocs. v. Board of County Comm'rs of Arapahoe County*, 945 P.2d 395, at footnote 1 (Colo. 1997).

The key to understanding the issues decided by the Colorado Supreme Court is an understanding of the concept of, and the necessity for, "redemption interest." In the case for which review is sought, the State Supreme Court first gives a detailed explanation and analysis of the Colorado laws pertaining to the valuation of property for the purpose of ad valorem taxation, and those laws setting forth the statutory scheme for collection of general property taxes. *See App 7 to App 11, Petition For Writ of Certiorari.*

The Colorado high court goes on to explain the purpose and necessity for "redemption interest." As the Court stated, " the purpose underlying this scheme is to ensure that the county has a consistent source of revenue." *See App 11 to Petition for Writ of Certiorari. See also Liebhardt v. Department of Revenue,* 123 Colo. 369, 374, 229 P.2d 655, 658 (1951)

The Colorado Supreme Court rejected Petitioners' arguments that there was a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution or the principles set forth by the United States Supreme Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), and *Harper v. Virginia Dept. of Taxation,* 113 S. Ct. 2510, 125 L.Ed.2d 74 (1993).

Petitioners' now raise essentially the same issues and make the same arguments to this Court that they raised and made to the Colorado Supreme Court, and which were rejected by the Colorado Supreme Court.

REASONS FOR DENYING THE WRIT

I. The Petition fails to meet the considerations governing review on certiorari set forth in the Court's Rule 10.

Looking initially at the Court's considerations governing review on certiorari (Rule 10), while recognizing that said considerations are neither controlling nor fully measuring of the Court's discretion, the subject Petition for Writ of Certiorari ("Petition") does not adequately raise any of the considerations the Court usually uses to review such Petitions.

The Petition is not based on a decision entered by a United States Court of Appeals. Further, though the Petition claims that a state court of last resort, i.e., the Supreme Court of Alaska, in *Cool Homes, Inc. v. Fairbanks*, 860 P.2d 1248 (Alaska 1993), has decided an important federal question in a way that conflicts with the decision of another state court of last resort, i.e., the Supreme Court of Colorado in the subject appeal, *Dove Valley Bus. Park Assocs. v. Board of County Comm'rs of Arapahoe County*, 945 P.2d 395 (Colo. 1997), a careful reading of *Cool Homes* distinguishes *Cool Homes* from *Dove Valley*, and thus fails to support Petitioners' contention of a conflict between state courts of last resort.

Additionally, the Supreme Court of Colorado has not decided an important question of federal law in a way that conflicts with relevant decisions of the Supreme Court of the United States. There are no compelling reasons for this Court to grant the Petition herein.

II. The decision of the Supreme Court of Colorado on the federal issues raised in the subject case is not in conflict with established precedent of the Supreme Court of the United States.

The cases cited by Petitioners in support of their claim that the Colorado Supreme Court's decision conflicts with established but older precedent of the United States Supreme Court are over a century old, arise from a totally different fact pattern, and are not directly on point. The cases, i.e., *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 6 S.Ct. 1144, 30 L.Ed. 125 (1886) and *County of Santa Clara v. Southern Pac. R. Co.*, 118 U.S. 39, 6 S.Ct. 1132, 30 L.Ed. 118 (1886), did not involve "redemption interest" payable to third parties as an inducement to pay or "loan" the taxes necessary for the efficient and continuous operation of local government. In short these two old "railroad" cases turned on the simple fact that the subject California counties could not collect any taxes on certain of the railroad's property. The cases involved property that in effect was "exempt" and not a situation of taxable property that was later determined to have been incorrectly valued.

III. The decision of the Supreme Court of Colorado found and held that the collection of redemption interest on an erroneous assessment does not amount to an unconstitutional taking.

Contrary to the contention of the Petitioners, the decision of the Supreme Court of Colorado did not sustain the validity of a state statutory taxing scheme which violates the Due Process Clause and the Taking Clause of the Fifth and Fourteenth Amendments to the United

States Constitution. The Colorado Supreme Court did acknowledge Petitioners' argument that the statutory scheme, including the disposition of redemption interest, will sometimes produce a harsh result. That Court went on to explain that this is so because tension exists between the government's need to generate revenue and the property owner's rights in connection with his property. Further, with respect to provisions for redemption, the Colorado legislature resolved these conflicting interests in favor of the County. Absent constitutional infringement, it is not our province to rewrite the statutes. *See Nelson v. City of New York*, 352 U.S. 103, 111 (1956) (stating that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts"). *See App 17 and 18, Petition For Writ of Certiorari.*

As this Court stated in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980):

> This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. *See, e.g. Andrus v. Allard*, 444 U.S., at 64-68, 100 S.Ct., at 326-328; *Penn Central Transportation Co. v. New York City*, 438 U.S., at 125-129, 98 S.Ct., at 2660-2662.

In Colorado, delinquent taxpayers have no constitutional right to redemption. Instead, redemption is a statutory privilege created by the state legislature that may be exercised only as provided by statute. Redemption is "a gratuity which, if granted, may be restricted" as the

legislature deems appropriate. If the County cannot compel the taxpayer to pay property taxes on a parcel, then the County must find someone who will or else strike the property from the County tax rolls and suffer a loss of revenue. In most counties, the principal source of revenue is from property taxes. Should the property go to tax sale, it is imperative that the county finds an investor to purchase the lien.

Redemption interest furthers the goal of providing a consistent source of income by discouraging taxpayers from allowing their properties to go to a tax lien sale, and by encouraging third-party bidding as purchasers of the tax liens. *See App 11 to App 13, Petition For Writ of Certiorari.*

CONCLUSION

For the reasons given above, the Petition should be denied.

Dated: February 16, 1998

Respectfully submitted,

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